

NOT FOR CITATION

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

PACIFIC COAST BUILDING PRODUCTS,  
INC.,

Plaintiff,

No. C 05-4976 PJH

v.

**ORDER GRANTING DEFENDANT'S  
MOTION TO DISMISS**

AIU INSURANCE COMPANY,

Defendant.

Defendant's motion to dismiss plaintiff's complaint came on for hearing before this court on February 1, 2006. Plaintiff Pacific Coast Building Products, Inc. ("Pacific Coast") appeared through its counsel, Richard Shevely, and defendant AIU Insurance Co. ("AIU") appeared through its counsel, Kevin G. McCurdy. Having read the parties' papers and carefully considered their arguments and the relevant legal authority, and good cause appearing, the court hereby GRANTS the motion as follows, for the reasons stated at the hearing.

1. Plaintiff's complaint is dismissed for failure to allege horizontal exhaustion of all primary policies which could constitute underlying insurance to the AIU excess policy, as required by California law and Ninth Circuit precedent. See Comm. Redevelopment Agency v. Aetna Cas. & Surety Co., 50 Cal. App. 4th 329 (1996)(holding that this "horizontal exhaustion" rule should be applied in continuous loss cases); Employers Ins. of Wasau v. Granite State Ins. Co., 330 F.3d 1214 (9th Cir. 2003)("liability under a secondary [excess] policy will not attach until all primary insurance is exhausted..."). Plaintiff is granted leave to amend in order to cure this defect.

2. Plaintiff's complaint is dismissed for failure to allege the nature of the claims for which plaintiff claims coverage. Since plaintiff alleges that the claims constitute a continuous loss, the facts supporting the actual claims – including factual allegations as to their precise nature, time frame, and amounts – are necessary to determine the scope of coverage, particularly under the horizontal exhaustion doctrine. Plaintiff's failure to allege sufficient facts violates the fair notice requirement. See, e.g., Yamaguchi v. United States Dept. Of the Air Force, 109 F.3d 1475, 1481 (9th Cir. 1997) (pleading must give "fair notice" of the claim being asserted and the "grounds upon which it rests"); see also Lucien v. Preiner, 967 F.2d 1166, 1168 (7th Cir. 1992) (complaint must include "operative facts" upon which claim is based). Plaintiff is granted leave to amend in order to properly allege the operative claims at issue.

In addition to the above, defendant objected that plaintiff originally failed to attach the operative AIU insurance policy, and therefore failed to properly allege the policy's terms and conditions. Defendant's point is well taken. However, as the court noted at the hearing, plaintiff's first amended complaint filed subsequent to the filing of defendant's motion attached the AIU policy as an exhibit, and cures defendant's objection on this point.

Accordingly, defendant's motion to dismiss plaintiff's complaint is GRANTED for the above reasons. Plaintiff is granted leave to amend. Plaintiff shall have thirty days from the date of this order to amend the complaint. Defendant shall have until twenty days thereafter to respond to the amended complaint.

**IT IS SO ORDERED.**

Dated: February 15, 2006



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PHYLLIS J. HAMILTON  
United States District Judge